

Exhibit I

5-31-06 suppression hearing transcript.txt

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65VVVILH

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----X
2

3 UNITED STATES OF AMERICA,

4 v.

05 CR 621 (KMK)

5 ALBERTO VILAR,
5 GARY TANAKA

SUPPRESSION HEARING

6 Defendants.
6
7 -----X
7

8 New York, N.Y.
9 May 31, 2006
9 10:05 a.m.

10
10
11 Before:

11
12 HON. KENNETH M. KARAS,
12

District Judge

13
13
14 APPEARANCES
14

15 MICHAEL J. GARCIA
16 United States Attorney for the
16 Southern District of New York
17 DEIRDRE MCEVOY
17 MARC LITT
18 Assistant United States Attorneys
18

19 HOFFMAN & POLLOK
19 Attorneys for Defendant Alberto Vilar
20 JEFFREY C. HOFFMAN
20 SUSAN C. WOLFE

21 Attorneys for Defendant Gary Tanaka:

22 WILSON SONSINI GOODRICH & ROSATI
23 GLENN CHARLES COLTON

23 -AND-

24 KOBRE & KIM
24 STEVEN GARY KOBRE
25

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65VVVILH

1 (In open court)
2 (Case called)

3 THE DEPUTY CLERK: United States of America versus
4 Alberto Vilar and Gary Tanaka. Criminal cause for suppression
5 hearing. If counsel can state their appearances for the record
6 please.

7 MS. MCEVOY: Deirdre McEvoy and Marc Litt for the
8 government. Good morning, your Honor. With us is Postal

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15 Q. Mr. Licker, you mentioned that you don't believe you were
16 the one who brought up the topic of receiving a subpoena and
17 calling off the search for that day?
18 A. Correct.
19 Q. Had that ever happened before in your career, that a
20 subpoena was exchanged for the completion or the calling off of
21 the search?
22 A. I had not had any prior experience in that regard.
23 Q. Had you ever heard of that happening?
24 A. I don't believe so.
25 MS. WOLFE: Thank you.

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18

65VVVILH Licker - direct
THE COURT: Mr. Colton.

DIRECT EXAMINATION

BY MR. COLTON:

1 Q. Good morning, Mr. Licker.
2 A. Good morning.
3 Q. When you said on direct with Ms. Wolfe that you're counsel
4 to Amerindo, specifically what Amerindo entity were you and are
5 you counsel for?
6 A. Amerindo Investment Advisors, Inc., a California
7 corporation.
8 Q. What has been come to be known in this case and in the
9 joint S.E.C. case as Amerindo-U.S.?
10 A. That's how I refer to it.
11 Q. And at any time from May 26th, 2005 to today, have you
12 represented Amerindo-U.K.?
13 A. No.
14 Q. At any time between May 26, 2005 and today, have you
15 represented Amerindo-Panama?
16 A. No.
17 Q. At any time between May 26, 2005 and today, had you
18 represented Amerindo-Cayman?
19 A. No.
20 Q. You said in response to a question by Ms. Wolfe that you
21 had early on agreed to preserve documents. Were you discussing
22 the search with Mr. Litt, is that correct?
23

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65VVVILH Licker - direct

1 A. Correct.
2 Q. Did you agree to preserve documents and other information
3 before the subject of a subpoena even came up?
4 A. Yes.
5 Q. When you say you agreed to preserve documents and
6 information, did that include computerized information?
7 A. I didn't draw any limitation on it.
8 Q. Was it your intent in making a representation to Mr. Litt
9 that you would preserve information that you would do what you
10 could also to preserve computerized or electronic
11 information --
12 A. Yes.
13 Q. -- for Amerindo U.S.?
14 A. Yes.
15 Q. Now, after you received service of the subpoena from
16 Mr. Litt and the government, the government told you to hold
17 off on complying with the subpoena because employees of
18 Amerindo were helping the government in other capacities, isn't
19 that correct?

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20 A. Mr. Litt indicated to me that the date on the subpoena, the
21 return date on the subpoena, would not be binding; he wouldn't
22 hold me to it. And so I don't think he said I should
23 affirmatively hold off, but he certainly indicated to me that I
24 didn't have to comply at that time.

25 Q. And during the summer of 2005, after accepting service of
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1 the subpoena, employees of Amerindo and yourself were being
2 cooperative with the government in their investigation,
3 correct?

4 A. Yes.

5 Q. At no time from May 26, 2005 to today did any attorney for
6 Gary Tanaka instruct you not to comply with the subpoena,
7 correct?

8 A. Correct.

9 Q. When you were at the offices of Amerindo U.S. on May 26,
10 2005, did any government employees outside of the postal
11 inspection service or the Department of Justice show up at the
12 search?

13 A. Yes. I believe it was that day, I'm not 100 percent sure,
14 but I believe it was that day.

15 Q. And who do you believe showed up at the search?

16 A. The S.E.C. conducted an on-site examination.

17 Q. And who from the S.E.C. do you recall being present at the
18 search?

19 A. I believe -- I know that Mark Salzberg was there, I think.
20 You know, I've gotten at that age where I forget things. But I
21 believe -- I believe Kaye Lackey was there, but she might not
22 have been. I might be wrong. There were about four people
23 there. I'm not so great with names.

24 Q. What about Paul -- I'm sorry. Go ahead.

25 A. I'm not so great with names. And I didn't know those
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1 people at the time, so --

2 Q. What about Paul Gizzi? G-i-z-z-i.

3 A. Paul I actually know. And I don't recall that Paul was
4 present at that time.

5 Q.

6 MR. COLTON: Let the record reflect that when the
7 discussion of what happened at the search occurred, Ms. McEvoy
8 and Ms. Fraterrigo were discussing the testimony that
9 Mr. Licker just gave, or at least had a conversation.

10 THE COURT: How do you know what they were talking
11 about?

12 MR. COLTON: I take it back. I said at least had a
13 conversation immediately following the comment that Mr. Licker
14 made about the evens of the search.

15 THE COURT: What's the purpose of that?

16 MR. COLTON: Because, your Honor, I made a motion
17 about the exclusion --

18 THE COURT: She could be commenting on his tie.

19 MR. COLTON: Could be.

20 THE COURT: It's pure speculation. She's represented
21 she's not going to testify about the subpoena. She's here
22 presumably to assist Ms. McEvoy, and there's nothing improper
23 about that. So you can have the record reflect what you want,
24 but I don't think it reflects anything other than two people

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25 having a conversation.
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1 MR. COLTON: Just a temporal, and that's fine, your
2 Honor. I'll move on.
3 THE COURT: Please.
4 BY MR. COLTON:
5 Q. Mr. Licker, in your 27 years of practice, had you ever seen
6 S.E.C. civil attorneys show up at a search conducted by the
7 Department of Justice or criminal investigators?
8 A. No.
9 Q. To your knowledge, did S.E.C. personnel show up at any
10 other Amerindo offices on the day of the search, May 26, 2005?
11 A. Once again, I believe it was that day, it could have been
12 the next day, but I believe it was that day, that someone
13 showed up at the Amerindo office in San Francisco, as well.
14 Q. Did you have a discussion with the S.E.C. attorneys at the
15 search, or at Amerindo-U.S.?
16 A. I spoke to the individual in San Francisco on the
17 telephone, and I certainly spoke to the individuals who were
18 present at Amerindo, whether it was the 26th or the 27th. And
19 they were there for a couple of days.
20 Q. And during the S.E.C.'s visit to Amerindo, did they make
21 any requests of you for relief?
22 A. I'm not sure it was there at the visit. I know that the
23 S.E.C. wanted to have a receiver appointed, and that there were
24 conversations, some of which involved me, a number of which
25 involved my then partner, Rick Marshall at K&L, on behalf of
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1 Amerindo in that regard.
2 Q. And in requesting a receiver, did they specify what
3 Amerindo entities they were seeking your consent for a
4 receiver?
5 A. Amerindo-U.S.
6 Q. Did they limit it to Amerindo-U.S., or is that your
7 understanding?
8 A. It's difficult. The parlance became -- everyone
9 particularly on the S.E.C. side became very comfortable simply
10 referring to Amerindo and not drawing distinctions. I tried to
11 draw distinctions whenever I could.
12 Q. During the course of your attendance at Amerindo-U.S. on
13 May 26, 2005, did anybody for the U.S. government ever give you
14 a copy of the complaint against Gary Tanaka?
15 A. No.
16 Q. At any point during that day, did they give you the
17 complaint against Alberto Vilar?
18 A. No.
19 Q. At any point during this day of the search, May 26, 2005,
20 did anyone from the U.S. government give you a copy of the
21 search warrant affidavit?
22 A. I don't believe so.
23 Q. In conducting your representation of Amerindo-U.S. from May
24 26, 2005 to today, did you ever have an intent in the way in
25 which the subpoena was accepted or complied with or not
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65VVVILH Licker - direct
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 1 complied with to help achieve a strategic advantage for the
 2 defendants in this criminal case?
 3 A. My intent was only to cooperate with the government's
 4 investigation.
 5 Q. For how long have you represented Amerindo-U.S. prior to
 6 the day of the search?
 7 A. I had been involved in the representation of Amerindo in
 8 connection with an S.E.C. inquiry beginning in May of 2003.
 9 And there were a couple of inquiries. There was an S.E.C.
 10 investigation of another entity, not Amerindo, for which
 11 Amerindo received a nonparty subpoena. I was involved in that,
 12 as well. So from May of '03 through May of '05 I had
 13 involvement in matters.
 14 Q. In the two years between May of '03 and May of '05, did you
 15 become familiar with the business of Amerindo-U.S.?
 16 A. Basically, yes.
 17 Q. Prior to May 26, 2005, had you ever heard the phrase
 18 "guaranteed fixed rate deposit account"?
 19 A. I had not. I had not.
 20 Q. Had you ever been familiar with an Amerindo investment
 21 product called the SBIC Venture Fund?
 22 A. I was not.
 23 Q. To your understanding, what was the business of
 24 Amerindo-U.S. in May 2005?
 25 A. It was an investment adviser; it had-- it advised a public
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 1 fund; and some number, I later came to know that number was
 2 something around 20, individually-managed accounts held by
 3 institutions.
 4 Q. And they were also the investment adviser to a mutual fund?
 5 A. I said that, right.
 6 Q. And they had individual clients for whom they would make
 7 investment decisions, but not necessarily have authority to
 8 take money out of accounts, is that correct?
 9 A. You have to watch the parlance. They were
 10 individually-managed accounts. They weren't individual
 11 investors, they were institutional investors.
 12 Q. In your representation of what you learned factually about
 13 the company, was it your opinion that fixed rate accounts and
 14 SBIC was a small, if not unknown, percentage of what was this
 15 business?
 16 MS. MCEVOY: Objection.
 17 THE COURT: Basis of the objection?
 18 MS. MCEVOY: His legal opinion.
 19 MR. COLTON: I'm asking factually.
 20 THE COURT: Go ahead. Overruled.
 21 A. I knew nothing about guaranteed fixed rate deposit
 22 accounts, so I couldn't place any percentage.
 23 Q. At any time during the course of your interaction with
 24 Mr. Litt on May 26, 2005, did you ever promise him, No matter
 25 what, we are going to give you every single thing called for by
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 1 this subpoena, or did you promise to accept service of the
 2 subpoena and work with the government to provide the documents
 3 that the two sides thought were necessary to the investigation?
 4 A. I'm sorry to be indirect in my answer, but I have to be. I
 5 accepted service, I agreed to do that. And I made it

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- 11 May 26, 2005?
12 A. 212-536-3916.
13 Q. Your testimony is that you received a call at your offices
14 at Kirkpatrick & Lockhart sometime that morning regarding a
15 search that was to occur at Amerindo's offices?
16 A. I did receive a call that morning, and I did come to
17 understand that a search was being conducted at that time.
18 Q. And you went down to Amerindo's offices then, is that
19 correct?
20 A. Correct.
21 Q. And when you went to Amerindo's offices, is it fair to say
22 that you saw a copy of the search warrant?
23 A. I believe I did, yes.
24 Q. You satisfied yourself that the postal inspectors had the
25 right to be on the premises to search it, correct?

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65VVVILH Licker - cross

- 1 A. I didn't have any doubt about that.
2 Q. And you went back and forth from Kirkpatrick & Lockhart to
3 Amerindo that day; correct?
4 A. I returned to Kirkpatrick & Lockhart one time during the
5 day between about 1 and 2. I went back to Amerindo until
6 about, I guess, about 9 or 9:30.
7 Q. And do you recall whether you had your cell phone on you
8 that day?
9 A. I believe I did.
10 Q. And what about your BlackBerry?
11 A. I must have. I don't recall one way or the other.
12 Q. And prior to May 26, you only had been to Amerindo's
13 offices on a couple of occasions, correct?
14 A. That's correct.
15 Q. And you weren't familiar with which Amerindo employees
16 occupied which offices, correct?
17 A. I wasn't familiar with all of them, that's correct.
18 Q. And you weren't familiar with the identity and location of
19 particular files at Amerindo, correct?
20 A. That's correct.
21 Q. You testified that you had a number of conversations with
22 Mr. Litt on that day, is that right?
23 A. Correct.
24 Q. And did you speak to Mr. Litt about the fact that Mr. Vilar
25 had contacted Amerindo employees?

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65VVVILH Licker - cross

- 1 A. I definitely recall speaking to Mr. Litt about whether or
2 not Amerindo employees could speak to Mr. Vilar. I just don't
3 recall at that point whether -- whether Mr. Vilar had called in
4 or somebody wanted to call him. I don't remember the details.
5 But I know we talked about contacting Mr. Vilar.
6 Q. When you say Mr. Vilar called him, who's the "him" that
7 you're referring to?
8 A. I'm sorry, I said "called in."
9 Q. Oh, called in. Sorry. And do you recall Mr. Litt's
10 response?
11 A. Yes.
12 Q. What do you recall -- how do you recall him responding?
13 A. The burden of the conversation was the employees wanted --
14 they were aware that Mr. Tanaka had been arrested; they were
15 aware that Mr. Vilar was out of town on a business trip. And

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16 they wanted to let him know what was going on. And I asked
17 Mr. Litt what the government's view would be if Amerindo
18 employees did that.
19 I asked him that question because I had made it clear
20 to him that we intended to cooperate, and it was very important
21 to me that we do whatever we possibly could to avoid having the
22 company indicted. And he indicated to me that he would
23 strongly prefer that we not let Mr. Vilar know about that.
24 Q. And is it fair to say that you also talked to Mr. Litt that
25 day about the arrest warrants that had been issued in the case?

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65VVILH Licker - cross

1 A. We certainly spoke about the fact of an arrest, and the
2 fact that there would be another arrest. I don't know that we
3 talked about the warrants.
4 Q. And you were also dealing with a number of issues with
5 regard to potential conflicts that day, is that correct --
6 A. That's correct.
7 Q. -- relating to the representation of the company and the
8 U.S. mutual fund?
9 A. That's correct. Kirkpatrick & Lockhart had historically
10 represented both mutual fund and the company. And at this
11 point it became clear that that could not continue.
12 Q. You spent a lot of time that day dealing with those
13 conflict issues, is that correct?
14 A. I believe so.
15 Q. Did you discuss any of those conflict issues with Mr. Litt?
16 A. I imagine I did, yes.
17 Q. And when you spoke to Mr. Litt that day, you asked Mr. Litt
18 about the reasons for executing a search warrant, in light of
19 the fact that the -- that Amerindo had been cooperating with
20 the S.E.C., is that true?
21 A. I suspect I did.
22 Q. And you testified that you indicated to Mr. Litt that
23 Amerindo wanted to cooperate fully with the government in its
24 investigation, correct?
25 A. I might have mentioned that several times.

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65VVILH Licker - cross

1 Q. And your testimony is that it was your initiative to issue
2 the preservation notice, correct?
3 A. I believe so, yes.
4 Q. And that was your practice in these types of circumstances,
5 correct?
6 A. Right.
7 Q. And that discussion regarding the preservation notice was
8 apart from any discussion about a grand jury subpoena, correct?
9 A. Correct.
10 Q. It's your testimony that you believe a conversation about
11 terminating the search in lieu of the grand jury subpoena
12 happened at approximately 1 o'clock that day, is that right?
13 A. I don't remember exactly when it did happen. Frankly, had
14 I not seen the time stamp on the grand jury subpoena, I would
15 have placed it later.
16 But that does refresh my recollection that Marc Litt
17 and I had a conversation -- a conversation about it when I was
18 back at my office at Kirkpatrick & Lockhart, which would have
19 been between 1 and 2. And I believe that that was our first
20 conversation about it.

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4 MR. COLTON: Well, he shouldn't be -- he should be
5 saying -- maybe he could say what his understanding is. But to
6 say somebody else told me, it's -- I mean I don't know what
7 these records are. They have redactions. How do we know what
8 it is? Seriously. They're going to rely on the phone records
9 to prove up apparently something that they're doing. At least
10 I'd like the record to be clear that he's testifying not from
11 personal knowledge.

12 THE COURT: Okay. I think that's a given. But my
13 question remains: Are you going to make them bring in the
14 telephone records person from the U.S. Attorney's Office?

15 MR. COLTON: It is not my intention at this minute,
16 I'll hear the rest of the testimony to see if we think it's
17 relevant. But it's not my intention at this minute.

18 THE COURT: Hearsay can come in at this point,
19 anyways, can it not?

20 MR. COLTON: It can. And the Court has the authority
21 whether to take that evidence or not.

22 THE COURT: All right. Technically speaking, I can
23 sustain the objection. But at the end of the day, the question
24 is whether or not Exhibit 29 is coming in. That's where this
25 is all leading to.

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65VVVILH Litt - direct

1 Are you going to object to 29 coming in?

2 MR. COLTON: I'll just hear the rest of the testimony.
3 My guess is probably not, as long as we know what it is.

4 THE COURT: I'm going to overrule the objection then,
5 and we'll wait for the exhibit to come in.

6 Go ahead, Ms. MCEVOY.

7 BY MS. MCEVOY:

8 Q. Mr. Litt, did you have a conversation or communication with
9 an administrative officer at the U.S. Attorney's Office
10 regarding the source of this record, this Government Exhibit
11 29?

12 A. Yes, I did.

13 Q. And what, if anything, did that communication reveal about
14 whether Government Exhibit 29 was created and maintained in the
15 ordinary course of U.S. Attorney's Office business?

16 A. It revealed Government Exhibit 29 was kept -- was created
17 and kept in the ordinary course of the U.S. Attorney's Office
18 business.

19 MS. MCEVOY: Your Honor, the government offers Exhibit
20 29.

21 MR. COLTON: I would say, your Honor, that if the
22 government's proffering this for calls that did happen, we have
23 no objection. But to proffer this for potentially calls that
24 didn't happen when they've redacted information from calls, it
25 would be an unreliable document to prove out it didn't happen.

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65VVVILH Litt - direct

1 THE COURT: If you want to do voir dire on the
2 redactions, knock yourself out. I mean the question is --
3 there are two separate questions in terms of whether the
4 document itself comes in as a business record, and then also
5 whether or not the redactions should remain as redactions. How
6 the redactions were done, what criteria was used, the latter
7 point, I think it's something you can explore if you want.

8 MR. HOFFMAN: Can I ask the Court if we can have an

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9 offer of proof as to relevancy to make it easy?
10 THE COURT: Okay. That's fair enough.
11 MS. MCEVOY: The government is proffering these
12 records, your Honor, to help explain what calls occurred to and
13 from Mr. Litt's office phone on the day of May 26, 2005.
14 THE COURT: Would these include telephone
15 conversations with Mr. Licker?
16 MS. MCEVOY: That's correct, your Honor.
17 THE COURT: And Inspector Fraterrigo?
18 MS. MCEVOY: That's correct, your Honor.
19 THE COURT: Anybody else?
20 MS. MCEVOY: Mr. Litt -- perhaps I could ask the
21 witness questions about what he did and what he did not redact.
22 BY MS. MCEVOY:
23 Q. Mr. Litt, what types of calls did you leave on the exhibit
24 and that you did not redact?
25 A. I left calls that came to -- that were made to or came from
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65VVVILH Litt - direct
1 phone numbers that I could associate with U.S. postal
2 inspectors; voice mail, both incoming and outgoing; or my
3 calling voice mail to pick up messages; calls to and from the
4 Court; calls to and from supervisors at the U.S. Attorney's
5 Office; calls to and from telephone numbers associated with --
6 that I knew to be associated with Eugene Licker; calls to and
7 from a phone number that I believe is associated with
8 Amerindo-U.S.
9 Q. And what did you redact?
10 A. And that's -- I mean without looking absolutely
11 line-by-line going through it, that's the best I can say.
12 THE COURT: Did you redact other work-related calls
13 that were unrelated to this investigation?
14 THE WITNESS: I'm not sure.
15 THE COURT: I'm trying to understand what criteria you
16 used to redact. Did you redact personal calls?
17 THE WITNESS: I redacted calls to my wife, home, and
18 cell phone. I redacted --
19 BY MS. MCEVOY:
20 Q. Did you redact calls to the S.E.C.?
21 A. I redacted calls to the S.E.C. on the grounds that they had
22 nothing to do with the issuance of a grand jury subpoena or the
23 search that was being conducted that day.
24 THE COURT: All right. Mr. Colton's standing. I know
25 what he's going to say.
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65VVVILH Litt - direct
1 It seems to me that calls to the S.E.C. are relevant
2 here. Calls to your wife, of course not. And if you were
3 working on some other case that's got nothing to do with the
4 events of that day or this case, I don't think there would be
5 an objection to that.
6 But calls to the S.E.C. on this case by definition
7 relate to this case. So I think that, at a minimum, this needs
8 to be modified to include calls to the S.E.C.
9 I assume that was what you were going to say,
10 Mr. Colton, among other things.
11 MR. COLTON: That was the first and most relevant
12 part. Your Honor got the best part.
13 THE COURT: All right.

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14 MR. COLTON: Is this an opportune time to do the voir
15 dire?

16 THE COURT: Sure. why not. Let's just get it over
17 with.

18 VOIR DIRE EXAMINATION

19 BY MR. COLTON:

20 Q. Mr. Litt, did you also redact calls where you couldn't tell
21 what the number was; in other words, a phone number associated
22 with someplace you didn't know?

23 A. I need to see the unredacted -- or the version of the
24 document that has the white tape on it so I can look at it
25 before I can answer that question.

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65VVVILH Litt - direct

1 MR. COLTON: Your Honor, we don't want to get the
2 redacted document. But for the sake of completeness of the
3 record, if it can be marked for identification, it will not be
4 given to defense without further order of the Court. But at
5 least we have --

6 THE COURT: All right. So the unredacted -- I think
7 that's right. I think we should mark that 290, for original,
8 for identification purposes. And then that's what's going to
9 be shown to Mr. Litt. So the record's clear.

10 THE WITNESS: The document that I'm asking for is not
11 the original, but, rather, the one that has -- it's an original
12 with redactant tape on it.

13 THE COURT: Right. But we're still going to call it
14 290. We can call it 290Q, it doesn't matter. The point is
15 it's the document that you're going to use to review your
16 redactions.

17 MS. MCEVOY: I'm handing you, Mr. Litt, what's been
18 marked for identification as Government Exhibit 290, which is
19 the unredacted original records, and Government Exhibit 29R,
20 which is your original redacted office phone records.

21 (Pause)

22 THE COURT: Mr. Colton.

23 MR. COLTON: Well, Mr. Litt looked up as if he
24 was ready to answer the question about calls shown on 290, so I
25 stood up to continue the voir dire.

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65VVVILH Litt - direct

1 THE COURT: Mr. Litt, are you ready to proceed?

2 THE WITNESS: Yes.

3 THE COURT: Fire away, Mr. Colton.

4 VOIR DIRE EXAMINATION

5 BY MR. COLTON:

6 Q. The question, Mr. Litt, was did you redact from Exhibit 29
7 for identification numbers where you just couldn't identify
8 whose phone number it was that was either incoming or outgoing?

9 A. There are only two numbers of that sort that were redacted.
10 One of them was a misdial, a five-second call, and it was a
11 misdial. It has the last four digits of a number that I do
12 know, and I believe it was -- well, anyway, it was a misdial, a
13 five-second call.

14 THE COURT: The person that you intended to dial, was
15 that somebody related to this case?

16 THE WITNESS: Loosely. In the sense that it was a
17 defense lawyer for an individual -- not a defense lawyer. It
18 was a lawyer for an individual that I had spoken to in

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24 A. Yes.

25 Q. And you filed briefs in this action?
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Litt - cross

1 A. Yes.

2 Q. And when you write briefs to the Court, you intended the
3 briefs to be accurate, correct?

4 A. I do.

5 Q. And when you make factual representations, you understand
6 that the Court is likely to rely on those?

7 A. Yes.

8 Q. And, therefore, you understand the importance of it being
9 accurate, correct?

10 A. Yes.

11 MR. COLTON: I don't have stickers, your Honor. But
12 this is a brief with the date that it was filed. If you want
13 me to sticker it, I can identify it by the precise brief and
14 date that was filed in the case.

15 THE COURT: We'll call it defense -- oh, looks like
16 somebody has stickers there.

17 MR. COLTON: I don't know what number we're up to.

18 BY MR. COLTON:

19 Q. Mr. Litt, I show you what's been marked as Defendant's AA
20 for identification with today's date.

21 THE COURT: Thank you. For the record, this is the
22 brief dated February 10, 2006?

23 MR. COLTON: Yes, your Honor.

24 Q. This is a brief that you were one of the signatories to?

25 A. Yes.

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Litt - cross

1 Q. And you read it before it was filed?

2 A. Yes.

3 Q. And had there been errors, you would have -- and you knew
4 about that after reading it, you would have corrected that?

5 A. Yes.

6 Q. And isn't it true that you as a signer to this brief
7 represented on page 3 of the brief toward the bottom of the
8 first full paragraph, "As a consequence, the search team was
9 informed that it need not complete the search because
10 Amerindo-U.S. had agreed to comply with the subpoena, and the
11 postal inspectors cut short the search." Isn't that correct?

12 A. It says that, and then there are some transcript cites.

13 Q. So as far as you knew, representing to the Court on
14 February 10, 2006, the search was cut short, and it need not be
15 completed because Amerindo-U.S. agreed to comply with the
16 subpoena, correct?

17 A. May I see the transcript cites?

18 Q. Do you have reason to believe that you incorrectly cited
19 the transcript in your brief to the Court?

20 A. No. It would help me to answer the question to see what
21 was cited as authority for that statement.

22 THE COURT: Whatever the authority was, that's what
23 the brief says, correct?

24 THE WITNESS: Yes.

25 THE COURT: Mr. Colton read the brief accurately?

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1 THE WITNESS: Yes.
2 THE COURT: Okay.
3 MR. COLTON: So if the witness is not going to adopt
4 the statement, I ask that the Court accept the statement as a
5 consequence, the last three lines, the first full paragraph,
6 page 3, Defense AA, as a party admission.
7 THE COURT: Ms. MCEVOY?
8 MS. MCEVOY: The government would object.
9 THE COURT: Why? The government signed the brief.
10 It's the government's brief.
11 I mean, look, if you want to cover on redirect the
12 transcript cites, but I think Mr. Colton's right. I mean it's
13 the government's brief, and it says what it says.
14 MS. MCEVOY: All right. On that basis, your Honor,
15 the government will direct on that.
16 THE COURT: All right. I mean briefs are used for
17 lots of things. I rarely see them as exhibits. You want to
18 offer the whole thing really just for the main purpose of that
19 sentence or those two sentences, that one sentence you just
20 read?
21 MR. COLTON: I don't wish to offer the whole thing.
22 It's not a jury trial. Your Honor's read the brief anyway.
23 THE COURT: Right.
24 MR. COLTON: Technically, I want to offer the
25 admission. But it's really a distinction about meaning, given
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1 who the fact finder is, and your Honor has already read it.
2 THE COURT: The document is already in, really, for
3 the purpose of that last sentence, the bottom of that full
4 paragraph on page 3. I take it you have no objection,
5 Mr. Hoffman?
6 MR. HOFFMAN: No objection.
7 THE COURT: All right.
8 BY MR. COLTON:
9 Q. You testified earlier about a conversation with Mr. Licker
10 which you described. He was saying he had a desire to go home
11 because it was late, on May 26, 2005, isn't that correct?
12 A. Yes.
13 Q. Isn't it true though that the postal inspectors would have
14 had to cease the search an hour and 10 minutes later, at 10
15 o'clock at night?
16 MS. MCEVOY: Objection.
17 THE COURT: Basis?
18 MS. MCEVOY: Form.
19 THE COURT: Overruled.
20 MR. COLTON: What was the objection?
21 THE COURT: Form. Overruled. Do you remember the
22 question?
23 THE WITNESS: I think so.
24 THE COURT: Go ahead.
25 BY MR. COLTON:

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1 Q. Isn't it true that the postal inspectors would have had to
2 cease the search at 10 o'clock at night, an hour and 10 minutes
3 after they actually did cease the search?
4 A. I don't know.

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1 The question of what representations were made is not a Franks
2 hearing. A Franks hearing is an inquiry into whether
3 misrepresentations were made.

4 THE COURT: Based on some sort of basis to believe
5 that there was a misrepresentation. What's your basis here to
6 think there was any misrepresentation?

7 MR. COLTON: I'm not asserting one at this time. I'm
8 asserting that we have a right to know what the representations
9 were, and then we can, if we wish, come to the Court and say, I
10 have a basis to say those representations were
11 misrepresentations.

12 THE COURT: All right. Maybe you have the transcript
13 already tagged and ready to go on this. There was some
14 discussion, call it a lucky guess, but there was some
15 discussion on this. You want to just take Mr. Litt through
16 that?

17 MR. COLTON: I don't. Because what I want to know
18 is -- I mean I'll proffer that what Mr. Litt told the Court
19 previously is Magistrate Maas asked the question of, well,
20 you're asking me to make a series of inferences to conclude
21 that Mr. Tanaka took client money to buy horses. And that
22 information is in the record.

23 But what I don't know, and what no one's ever asked,
24 is were there any other representations, any other questions?
25 What were the answers?

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1 Typically, when there's any other information
2 presented to a judge --

3 THE COURT: It's preserved somehow.

4 MR. COLTON: Yes.

5 THE COURT: Right.

6 MR. COLTON: And it wasn't.

7 THE COURT: Right.

8 MR. COLTON: So now I'm doing the only thing I can,
9 which are asking the people who were there.

10 THE COURT: All right. Go ahead. Ask the question.
11 Overruled.

12 BY MR. COLTON:

13 Q. Did Magistrate Judge Maas ask any questions about the three
14 warrants you were seeking or any of the supporting papers?

15 A. Magistrate Maas, in reviewing the Tanaka complaint, made a
16 statement to me that might or might not be viewed as a
17 question, which was to the effect of there's no direct evidence
18 that it was client money that was used to purchase the horses.

19 My response to that statement or question was, No, we
20 are asking the Court or -- no, I didn't say that.

21 The complaint -- that is based on a series of
22 inferences from certain paragraphs in the complaint, which I
23 believe I pointed to. And that is the sum and substance of
24 substantive conversation that was had with Magistrate Judge
25 Maas about any of the three warrants that were being sought

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1 that evening.

2 Q. Did Inspector Fraterrigo make any comments of that subject,

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3 Tanaka complaint, to Magistrate Judge Maas?

4 A. Not that I recall, no.

5 Q. Were there times when Inspector Fraterrigo was with
6 Magistrate Judge Maas that you weren't there?

7 A. We were seated around Magistrate Maas's dining room table
8 in temporary quarters that were rather crowded with boxes. And
9 I would say that we were all within 10 feet of each other the
10 entire -- well, Magistrate Maas may have left the room on one
11 or two occasions. But there was no time that I'm aware of when
12 Postal Inspector Fraterrigo was alone with Magistrate Judge
13 Maas.

14 Q. There came a time that you went back to Magistrate Judge
15 Maas for a further order with respect to the computers,
16 correct?

17 A. Yes.

18 Q. Between the time you got the first warrant and you went for
19 the extension of the warrant, there was an agreement with
20 Mr. Licker to preserve all evidence, correct, to preserve all
21 documents?

22 A. He said everything. He wasn't letting garbage leave the
23 office.

24 Q. And that was your understanding of the promise that was
25 made to you by counsel for Amerindo?

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65VVVILH Litt - cross

1 A. I assumed at some point garbage started leaving the office,
2 but yes.

3 Q. But in seeking further relief from Magistrate Judge Maas,
4 neither you, nor Inspector Fraterrigo, informed the magistrate
5 that you had an agreement with counsel for Amerindo that all
6 things would be preserved, and that the evidence would remain
7 intact for the government?

8 A. That's correct.

9 Q. You were the one who typed the search warrant affidavit on
10 May 25th, 2006, correct?

11 A. I don't know that I typed it on May 25th, 2006.

12 Q. The one that was presented to Magistrate Judge Maas for May
13 25th 2006?

14 A. I don't know that I typed that document in its entirety on
15 May 25, 2006.

16 THE COURT: Regardless of when you typed it, the
17 warrant that was presented to Magistrate Judge Maas, did you
18 type it?

19 THE WITNESS: Yes.

20 THE COURT: Okay.

21 Q. And, in fact, one of the representations made to Magistrate
22 Judge Maas was if it becomes apparent that computer items are
23 no longer necessary to retrieve and preserve as evidence, such
24 materials and equipment will be returned promptly, correct?

25 If you have the search warrant affidavit in front of
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1 you, if not, I'll be happy to get it for you.) question).

2 A. I got it. It sounds familiar.

3 Q. But despite the fact that you had an agreement and a
4 promise from counsel for Amerindo to preserve such evidence,
5 the computers were, nonetheless, kept for two weeks before
6 being returned, correct?

7 A. Well, I'm struggling because you say "the computers."

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8 There were certain computers that were imaged on-site and never
9 left the premises. There were certain computers, it's my
10 understanding, that left the site and were imaged elsewhere and
11 were returned within the time frame set forth in the warrant.

12 And there is a smaller subset of computers that left
13 the site, and for technical or other reasons could not be
14 imaged within the time frame set forth in the warrant. And it
15 was for that limited subset of computers that we went back to
16 the Court and requested additional time to image those, to
17 complete the process of imaging those computers.

18 Q. I'm making a different point. And that is, that Inspector
19 Fraterrigo, in a document drafted by you, promised the
20 magistrate that if it is no longer necessary to hold the
21 computers or any computer to preserve evidence, that computer
22 or equipment will be returned promptly. And nobody ever
23 informed the magistrate that there was an agreement by counsel
24 to preserve that evidence, an agreement accepted by the
25 government, correct?

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65VVVILH Litt - cross

1 A. I only pause because Mr. Hoffman stood up. I thought he
2 might be objecting to your question.

3 Q. It would be a first to object by custom break. He's not
4 objecting.

5 A. Could you restate the question?

6 Q. I'll break it down. There was an agreement with
7 Mr. Licker, counsel for Amerindo, to preserve all evidence,
8 correct?

9 A. Yes, we had an oral agreement.

10 Q. Okay. An agreement on which you relied?

11 A. Yes.

12 Q. Thus, it would not be necessary to keep any of the
13 business's computers to preserve evidence. There was an
14 agreement to do so with counsel for Amerindo, correct?

15 A. I don't think that's true, no.

16 Q. It is a relevant fact to the magistrate to determine
17 whether to allow you to keep other computer equipment or
18 whether there was a less restrictive means available to achieve
19 the government's evidence preservation ends, correct?

20 MS. MCEVOY: Objection. Asking for the magistrate
21 judge's views.

22 THE COURT: Well, I think the question more relates to
23 what it was that was represented to the magistrate in the
24 search warrant application, right?

25 Q. There's no question that there was a representation that

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65VVVILH Litt - cross

1 computers will be returned promptly if they're not necessary
2 for preservation of evidence?

3 THE COURT: And the follow-up question is when the
4 government went back to Magistrate Judge Maas. It's a fact,
5 Mr. Litt, is it not, that nobody told Magistrate Maas about the
6 agreement to preserve the evidence between the government and
7 Mr. Licker, is that right?

8 THE WITNESS: Yes.

9 THE COURT: Okay.

10 BY MR. COLTON:

11 Q. And you understood that the computers could well be very
12 important to the continuing running of the Amerindo business,

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13 correct?
14 A. I don't know what I understood about the computers in
15 question; that is, it is my impression that the vast majority
16 of computers seized from Amerindo had been returned within the
17 time frame. And as I sit here, I neither recall how many
18 computers were at issue, although -- nor do I recall the nature
19 of those computers.
20 THE COURT: Were there any computers that were not
21 imaged but left behind as of May 26?
22 THE WITNESS: Yes.
23 THE COURT: Okay.
24 THE WITNESS: But to be complete, I have to say that
25 was not an Amerindo computer.

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65VVVILH Litt - cross

1 THE COURT: Okay. Whose computer was it then?
2 THE WITNESS: I forget the name of the woman.
3 THE COURT: All right. So were there any Amerindo
4 computers that were left behind on May 26 that were not imaged
5 on-site?
6 THE WITNESS: To the best -- I wasn't -- to the best
7 of my knowledge, no.
8 THE COURT: Okay. Go ahead.
9 BY MR. COLTON:
10 Q. You were coordinating this investigation with the S.E.C.,
11 correct?
12 A. What do you mean by "coordinating"?
13 Q. You were sharing information with the S.E.C.?
14 A. Shared certain information.
15 Q. And they shared information with you?
16 A. I'm hesitating only because I'm trying to put -- this is
17 going on --
18 Q. I'll withdraw the question.
19 who was it that told the S.E.C. attorneys that a
20 search warrant was going to be -- or was executed on May 26,
21 2005?
22 MS. MCEVOY: Objection. Relevance.
23 THE COURT: what's the relevance, Mr. Colton?
24 MR. COLTON: The relevance -- I'd like to make --
25 Mr. Licker testified that the S.E.C. attorneys were --

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65VVVILH Litt - cross

1 MS. MCEVOY: Objection to --
2 MR. COLTON: well, I'll tell you --
3 MS. MCEVOY: -- explaining Mr. Licker's testimony in
4 front of the witness.
5 MR. COLTON: -- at sidebar.
6 THE COURT: Okay. Mr. Colton is the one who's been
7 scrupulous in making sure that witnesses don't hear things. If
8 he doesn't mind saying it, I'm not sure why you would.
9 MR. COLTON: Sidebar?
10 THE COURT: Fine.
11 (Continued on next page)
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65VVVILH Litt - cross
 1 clients and other types of clients that were serviced by
 2 Amerindo that would have nothing to do with the allegations in
 3 the search warrant application.

4 THE COURT: Okay. But it seems to me that if that
 5 argument holds water, it holds water regardless of whatever
 6 conversations were going on between the U.S. Attorney's Office
 7 and the S.E.C.

8 MS. WOLFE: Well, we're trying to elicit what Mr. Litt
 9 learned from the S.E.C.

10 THE COURT: But I still don't understand why that's
 11 relevant. I don't understand --

12 MR. COLTON: Let me make a suggestion. I'll leave
 13 that question for Ms. Wolfe later. They're going to do
 14 cross-examination out of turn. We can deal with that. I
 15 understand the Court's ruling.

16 THE COURT: you know what, we can take it up with
 17 Mr. Litt another time.

18 MR. COLTON: I understand the Court's ruling. A few
 19 more questions, and we can get to Detective Sergeant Shaw.

20 (Continued on next page)
 21
 22
 23
 24
 25

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65VVVILH Litt - cross

(In open court)

1 BY MR. COLTON:

2 Q. With respect to the less redacted phone records that are
 3 put into evidence, who did you call at the S.E.C. on May 26,
 4 2005, or who called you?

5 A. I believe I spoke with three different people, or at least
 6 my phone records reflect calls to three different people at the
 7 S.E.C.

8 Q. Who?

9 A. Kaye Lackey, Paul Gizzi, and Mark Salzberg.

10 Q. These are all the attorneys responsible for the enforcement
 11 action brought by the S.E.C.?

12 A. Yes.

13 Q. Had you done a grand jury subpoena instead of a search
 14 warrant application, the documents you received from the grand
 15 jury subpoena would be those you would not be entitled to give
 16 to the S.E.C., correct?

17 A. That's correct.

18 Q. But by doing a search warrant, you would be able to give
 19 the documents to the S.E.C., correct?

20 A. Actually, I have to modify my last answer.

21 Q. Okay.

22 A. It's not necessarily correct.

23 Q. There's a chance that you wouldn't be able to give it to
 24 the S.E.C. if you went by grand jury subpoena rather than
 25

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65VVVILH Litt - cross

1 search warrant?

2 A. Correct.

3 Q. But if you go by search warrant, your understanding is you

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 4 can give documents to the S.E.C.?
 5 A. Yes.
 6 Q. And, in fact, the Department of Justice did turn over a
 7 substantial quantity of documents to the S.E.C. to allow them
 8 to review them?
 9 A. Yes.
 10 Q. And you've conducted joint witness interviews with the
 11 S.E.C., correct?
 12 MS. MCEVOY: Your Honor, again, I'm not sure why we're
 13 going down this road.
 14 THE COURT: Yeah. We can probably do this another
 15 time.
 16 MR. COLTON: I was just clearing up the phone records.
 17 THE COURT: Okay.
 18 MR. COLTON: I'll withdraw that question. One moment.
 19 (Pause)
 20 BY MR. COLTON:
 21 Q. Mr. Litt, with respect to your conversation with Magistrate
 22 Judge Maas on the evening of May 25th, 2005, can you tell us
 23 which inferences, which series of inferences, and which facts
 24 you were pointing to in the complaint when you were speaking
 25 with Magistrate Judge Maas?

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65VVVILH Litt - cross
 1 A. Not without reference to the complaint.
 2 Q. I show you what is entitled "Sealed Complaint, United
 3 States of America v. Gary Alan Tanaka." For the purpose of
 4 this inquiry, it's a seven-page document signed by Cynthia
 5 Fraterrigo and sworn to before Magistrate Judge Maas on the
 6 25th of May 2005.
 7 THE COURT: Can we just for the record mark it BB? Is
 8 that all right?
 9 MR. COLTON: Sure. I was trying to expedite things.
 10 THE COURT: No, I appreciate that. We can do it
 11 later, if you want, but for the record, we'll just call it BB.
 12 MR. COLTON: All right.
 13 BY MR. COLTON:
 14 Q. What will be marked BB for identification --
 15 A. You've given me a lot more than seven pages.
 16 Q. It is just for ease, in case the other documents you wanted
 17 to refer to were presented to Judge Maas. But now you have
 18 just the seven.
 19 A. Thank you.
 20 (Pause)
 21 MR. COLTON: Just for the Court, while Mr. Litt is
 22 reading, this is the last reading. Just a couple questions and
 23 then we're done.
 24 THE COURT: All right. Is Detective Shaw available?
 25 MS. MCEVOY: Yes, he is.

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65VVVILH Litt - cross
 1 THE COURT: Then we'll take a short break.
 2 A. The best of my recollection is paragraphs 9 and 10.
 3 Q. So it's your testimony that you pointed to paragraphs 9 and
 4 10 in addressing Magistrate Judge Maas on the evening of the
 5 25th of May, 2005?
 6 A. I believe I testified and stated in open court previously
 7 that I said words to the effect of it's a chain of inferences,
 8 yes.

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9 And as I testified today, I recall pointing to
10 language in the complaint, as I said that. And the best
11 recollection I have as I sit here is that was the paragraphs I
12 just referenced.
13 Q. 9 and 10 you said? I can ask the court reporter, if you
14 don't mind.
15 A. 9 and 10.
16 Q. Thank you. Did Magistrate Judge Maas respond in any way to
17 you pointing to paragraphs 9 and 10 in the complaint, which
18 will be marked as Defendants' BB?
19 A. Did he respond to my pointing or my statement or both?
20 Q. Both or either.
21 A. I don't recall the specific words he used. It may have
22 been "I understand," but it was something short, and it was
23 something that conveyed his understanding of what I had
24 communicated to him.
25 Q. And just to be clear, this conversation was in no way
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1 recorded either by writing or tape or digitally or any other
2 way, to your knowledge?
3 A. To my knowledge.
4 MR. COLTON: Nothing further, your Honor. I'm just
5 going to give Mr. Litt a BB sticker for the document he holds.
6 THE COURT: Okay. All right. Let's take a 10-minute
7 recess. We will break with this witness, and then turn to
8 Detective Shaw. And it will be my sincere hope that we will
9 finish with him.
10 MR. HOFFMAN: It's my understanding, your Honor, that
11 the witness is not to discuss his testimony with anyone until
12 cross has resumed, or read any of the transcript of the
13 proceedings other than that which he testified.
14 THE COURT: Right. Or learn about whatever it is
15 Mr. Licker said, as well. Exactly, yes, that is understood.
16 All right.
17 THE WITNESS: Understood.
18 THE COURT: All right. We'll see you all in 10
19 minutes.
20 (Witness temporarily excused)
21 (Recess)
22 MR. LITT: Two issues. One to note that Inspector
23 Fraterrigo has left the courtroom and won't be here for
24 Detective Sergeant Shaw's testimony.
25 THE COURT: Okay.
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65VVVILH Litt - cross
1 MR. LITT: Second. One of the issues raised in
2 defense papers was a Franks hearing with respect to Detective
3 Sergeant Shaw. That matter is fully briefed; the Court has not
4 ruled. I don't know if the Court is prepared to rule.
5 If the Court is not prepared to rule, our intention
6 was to put on evidence testimony from Detective Sergeant Shaw
7 that would include testimony that gets to good-faith issues,
8 I'd just like to make it clear that by doing so, the government
9 is not conceding that it is either lawful or good policy or
10 anything else to have a Franks hearing with respect to
11 Detective Sergeant Shaw in this case.
12 THE COURT: Well, you know, some of it is what you
13 mean by a Franks hearing. I think it's undeniable that

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14 Detective Sergeant Shaw said something in his affirmation or
15 declaration or whatever it is that they call it in England to
16 get a search warrant that was untrue. And I'm not suggesting
17 by that that he did it intentionally or anything else, or that
18 it even matters.

19 But at the end of the day, one of the big defense
20 contentions here is that, of course, first they're saying the
21 warrant clause applies, even with a search done abroad. But
22 beyond that, even if the test is one of reasonability, to the
23 extent that the American government is relying on the
24 lawfulness of the search as the barometer for determining
25 reasonableness, they've got an expert who says the search

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Litt - cross

1 was -- the search warrant was unlawful because it went to the
2 wrong judge based on the facts that should have been known and
3 maybe were not made known to Detective Shaw, and we'll find
4 out.

5 So I don't know to call it a Franks hearing or if
6 you're calling it testimony that relates to the reasonableness
7 of the warrant.

8 I didn't find a lot case law that dealt with this in
9 the context of a foreign warrant. And I assume by your all not
10 citing me anything, you didn't either.

11 So I think there needs to be some testimony on this.
12 I'm not sure that makes it a Franks hearing. I think it goes
13 to the question of reasonableness and the lawfulness of the
14 warrant. Because even if you're right that the warrant clause
15 doesn't apply, you still have to show that it's a reasonable
16 search. And the cases you cite unto say that if it's legal in
17 their country and the laws in their country don't shock the
18 American conscience, and I think defense counsel wisely has not
19 argued that British law doesn't shock the conscience, at least
20 in this context, then if it's not a lawful warrant, then I'm
21 not sure what's left of your reasonableness argument.

22 MR. LITT: We expect testimony from Detective Shaw
23 about the lawfulness of the warrant.

24 THE COURT: So I don't know if that makes it a Franks
25 hearing or not. But it does go to whether or not the warrant

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Litt - cross

1 that he got was lawful.

2 MR. LITT: All I want to make clear is that we're
3 not -- by whatever testimony we put on that gets to the issues
4 here, we're not conceding a Franks hearing.

5 THE COURT: And I haven't ruled on it yet because I
6 think I need to hear some testimony as to how far the defense
7 gets to go. But I think they're entitled to at least ask some
8 questions based on what he said in his affidavit.

9 Mr. Kobre.

10 MR. KOBRE: Just from a scheduling perspective, is it
11 your Honor's -- would it be your Honor's position that on
12 Monday we would just resolve the -- finish up Detective Shaw's
13 testimony, and that we would set a new date for --

14 THE COURT: Yes. Thank you for making that clear.

15 MR. HOFFMAN: Try and make it even easier, if I might,
16 your Honor. I just discussed with Ms. Wolfe, if you can do
17 tomorrow from, I think you said, 12 to 2?

18 THE COURT: Yes, that's what we're shooting for.